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No. 06-413

Supreme Court, U.S.
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In The
Supreme Court of the United States

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE RESPONDENT

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QUESTION PRESENTED

Did the Ninth Circuit err by not deferring to the trial judge's observations and by not applying the statutory presumption of correctness in ruling that the state court decision to remove a juror was contrary to clearly established federal law?

TABLE OF CONTENTS

		Page
A.	STATEMENT OF FACTS	1
	1. PROCEDURAL HISTORY	1
	2. PROCEEDINGS IN THE TRIAL COURT	1
	3. THE WASHINGTON STATE SUPREME COURT	7
	4. THE CIRCUIT COURT	8
B.	SUMMARY OF THE ARGUMENT	8
C.	ARGUMENT	10
	1. THE PROPER STANDARD OF REVIEW	10
	2. THE WASHINGTON STATE SUPREME COURT'S DECISION WAS AN OBJECTIVELY UNREASONABLE APPLICATION OF *WITT*, *WITHERSPOON* AND *GRAY*	11
	3. THE WASHINGTON STATE TRIAL COURT'S "IMPLICIT FINDING" WAS AN OBJECTIVELY UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN STATE COURT	19
	a. Clearly erroneous findings are addressed by this Court under 28 U.S.C. § 2254(d)(2)	19
	b. To the extent that the trial court made a "finding" that Juror Deal was substantially impaired, it was objectively unreasonable and contrary to the clear and convincing evidence on the record	21

TABLE OF CONTENTS – Continued

Page

4. THE FACT THAT BROWN'S LAWYERS DID NOT OBJECT DOES NOT AID UTTECHT'S ARGUMENTS UNDER UNIQUE ASPECTS OF WASHINGTON LAW 29

5. THE NEED FOR DEFERENCE IN THIS CASE IS NO STRONGER THAN IN ANY OTHER CASE 31

D. CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Adams v. Texas, 448 U.S. 38 (1980) 12, 31

Batson v. Kentucky, 476 U.S. 79 (1986) 29, 30

Bell v. Cone, 535 U.S. 685 (2002) 10

Brown v. Lambert, 451 F.3d 946 (9th Cir. 2006) 1

Buchanan v. Angelone, 522 U.S. 269 (1998) 18

Darden v. Wainwright, 477 U.S. 168 (1986) 21, 31

Deck v. Missouri, 544 U.S. 622 (2005) 28

Gomez v. United States, 490 U.S. 858 (1989) 24

Gray v. Mississippi, 481 U.S. 648 (1987) ..... *passim*

Hennon v. Cooper, 109 F.3d 330 (1997) 27

Herrera v. Collins, 506 U.S. 390 (1993) 28

Marshall v. Lonberger, 459 U.S. 422 (1983) 23

Miller-El v. Cockrell, 537 U.S. 322 (2003) 20, 25, 28

Miller-El v. Dretke, 545 U.S. 231 (2005) 28

Norton v. Spencer, 351 F.3d 1 (1st Cir. 2003) 27

Patton v. Yount, 467 U.S. 1025 (1984) 23

Personal Restraint Petition of Brown, 143 Wn.2d 431, 21 P.3d 687 (2001) 1

Rice v. Collins, 546 U.S. 333 (2006) 20, 26

Skipper v. South Carolina, 476 U.S. 1 (1986) 17

State v. Bartholomew, 101 Wn.2d 631, 683 P.2d 1079 (1984), *appeal after remand*, 104 Wn.2d 844, 710 P.2d 196 (1985) 18

State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997) 29

TABLE OF AUTHORITIES – Continued

Page

State v. Beliz, 104 Wn. App. 206, 15 P.3d 683 (2001) 29

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997) ...1, 7, 30

State v. Burch, 65 Wn. App. 828, 830 P.2d 357 (1992) 29

State v. Clowes, 104 Wn. App. 935, 18 P.3d 596 (2001) 30

State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002) 30

State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) 30

State v. Evans, 100 Wn. App. 757, 998 P.2d 373 (2000) 30

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995) 15, 18

State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000) 30

State v. Knotek, 136 Wn. App. 412, 149 P.3d 676 (2006) 30

State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006) 29

State v. Littlefair, 129 Wn. App. 330, 119 P.3d 359 (2005) 30

State v. Woods, 143 Wn.2d 561, 23 P.3d 1046, *cert. denied*, 534 U.S. 964 (2001) 30

Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004), *cert. denied*, *Maddox v. Taylor*, 543 U.S. 1038 (2004) 20

Wainwright v. Witt, 469 U.S. 412 (1985).....*passim*

Wiggins v. Smith, 539 U.S. 510 (2003) 19

Williams v. Taylor, 529 U.S. 362 (2000) 11

TABLE OF AUTHORITIES – Continued

Page

Witherspoon v. Illinois, 391 U.S. 510 (1968).....11, 27, 31

Yarborough v. Gentry, 540 U.S. 1 (2003) 25

STATUTES

28 U.S.C. § 2254.....8, 9, 10, 20

RCW 10.95.020.....14, 15

RCW 10.95.060.....14, 15

RCW 10.95.070.....14, 16, 17

RULES

RAP 2.5..... 29

A. STATEMENT OF FACTS

1. PROCEDURAL HISTORY

Cal Coburn Brown was convicted of aggravated first-degree murder and sentenced to death following a jury trial in the King County Superior Court. JA 155. He appealed the judgment to the Washington State Supreme Court and it was affirmed on appeal. *State v. Brown,* 132 Wn.2d 529, 940 P.2d 546 (1997); Pet. App. 92a-221a.[1]

Following exhaustion of the available Washington State remedies, Brown filed a petition for writ of habeas corpus in the United States District Court for the Western District of Washington. After an evidentiary hearing, the District Court issued an order denying the writ and entered judgment against Brown. JA 43a-92a.

On June 19, 2006, a panel of the Ninth Circuit Court of Appeals reversed the District Court and granted the writ. *Brown v. Lambert*, 451 F.3d 946 (9th Cir. 2006); JA 1a-41a.

2. PROCEEDINGS IN THE TRIAL COURT

Uttecht does not properly describe Juror Deal's voir dire. He variously suggests that it was "ambiguous" or "generic." He also suggests that Juror Deal's comments regarding recidivism were "pivotal" or "central" to his consideration of the death penalty. These characterizations are not accurate. Both the prosecution and defense were

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[1] Brown also filed a personal restraint petition seeking collateral review of his conviction in the Washington State Supreme Court and it was denied. *Personal Restraint Petition of Brown,* 143 Wn.2d 431, 21 P.3d 687 (2001).

given substantial opportunity to question Juror Deal. The questions were detailed. At the outset, Juror Deal stated he believed in the death penalty in severe situations. Uttecht has not argued that this qualification impaired Juror Deal's ability to consider the death penalty. In Washington, as in most other states, the death penalty is by statute reserved for the most serious homicides. When asked to explain further, Juror Deal indicated he was keeping an open mind. He could not, at that stage of the proceedings, "draw a real line" as to which homicides were the most severe. He opined that someone who was "temporarily insane" might not deserve the death penalty. When asked directly if he would "find it difficult to vote for the death penalty given a situation where he wouldn't kill again," Juror Deal replied, "I would have to give that some thought." The prosecutor asked again: "[C]ould you consider it, and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?" Juror Deal said unequivocally, "Yes, sir." JA 71-73.

> The relevant verbatim portions of the transcript are as follows:
>
> Defense Counsel: . . . I would like to start off asking you some questions about your feelings about the the death penalty. I want to reinforce what the judge has already told you, which is there are no right or wrong answers . . .

JA 57-58.

> Defense Counsel: Can you give me an idea of what your general feelings about the death penalty are?

> A. I do believe in the death penalty in severe situations . . .

JA 58. Defense counsel and Juror Deal then discussed a specific Washington case where the defendant had indicated he wanted to be put to death. Deal indicated that the death penalty would be appropriate in that situation. JA 59. Defense counsel then asked:

> If you removed that factor completely from it, is that again the type of case that you think the death penalty would be appropriate?
>
> A. It would have to be a severe case. I guess I can't put a real line where that might be . . .

Id. Juror Deal indicated that a person who was "temporarily insane" would probably not deserve the death penalty.

> Defense counsel: Were you aware before that Washington has got this kind of sentence where it's life without parole where you are not ever eligible for parole?
>
> A. I did not until this afternoon.
>
> Defense Counsel: That is the two options that the jury has if they found the person guilty of premeditated murder beyond a reasonable doubt plus aggravating circumstances beyond a reasonable doubt. Do you think that you could consider both options?
>
> A. Yes, I could.
>
> Defense Counsel: Could you give me an idea sort of have you thought about sort of the underlying reason why you think the death penalty is appropriate, what purpose it serves, that kind of thing?

> A. I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate.
>
> Defense Counsel: Okay. Now, knowing that you didn't know before when you were coming to those opinions about the two options that we have here obviously somebody who is not going to get out of jail no matter which sentence you give them if you got to that point of making a decision about the sentence, does that mean what I'm hearing you say is that you could consider either alternative? [sic]
>
> A. I believe so, yes.

JA 61-62. When asked what he thought about the "frequency of the use of the death penalty in the United States," Juror Deal stated:

> . . . I don't think it should never happen, and I don't think it should happen 10 times a week either. I'm not sure what the appropriate number is but I think in severe situations, it is appropriate.
>
> Defense counsel: It sounds like you're a little more comfortable that it is being used some of the time?
>
> A. Yes.
>
> Defense Counsel: You weren't happy with the time when it wasn't being used at all?
>
> A. I can't say I was happy or unhappy, I just felt that there were times when it would be appropriate.

JA 63.

The prosecutor first confirmed with Juror Deal that he had stated in his questionnaire that he was in favor of the death penalty. JA 69. Juror Deal acknowledged that he had filled out the questionnaire before he read the juror's handbook. *Id.* The prosecutor noted that Juror Deal had indicated that life in prison would be appropriate if there was proof that the defendant would not kill again. JA 71.

> Prosecuting Attorney: I guess the reverse side of what you're saying is, if you could be convinced that he wouldn't kill again, would you find it difficult to vote for the death penalty given a situation where he couldn't kill again?
>
> A. I think I made that statement more under assumption that a person could be paroled. And it wasn't until today that I became aware that we had a life without parole in the state of Washington.
>
> Prosecuting Attorney: And now that you know there is such a thing and they do mean what they say, can you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life?
>
> A. I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole.
>
> Prosecuting Attorney: And I realize this is put on you rather suddenly, but you also recognize as someone who is representing the State in this case, we have made the election to ask that the jury if he is found guilty, ask that the jury vote for the death penalty. And I'm asking you a very important thing and to everyone in here, whether you, knowing that the person would

never get out for the rest of his life, two things. And they're slightly different. One, whether you could consider the death penalty and the second thing I would ask you is whether you could impose the death penalty. I'm not asking a promise or anything. But I'm asking you, first, could you consider it, and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?

A. Yes, sir.

Prosecuting Attorney: So, this idea of him having to kill again to deserve the death penalty is something that you are not firm on, you don't feel that now?

A. I do feel that way if parole is an option, without parole as an option. I believe in the death penalty. Like I said, I'm not sure that there should be a waiting line of people happening every day or every week even, but I think in severe situations it's an appropriate measure.

Prosecuting Attorney: But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

A. I could consider it, yes.

Prosecuting Attorney: Then could you impose it?

A. I could if I was convinced that was the appropriate measure.

JA 71-73.

At the close of questioning, the judge asked: "Counsel, any challenge to this particular juror?" JA 74. The prosecutor moved to exclude Juror Deal for cause. He stated that he was not challenging Juror Deal on his confusion regarding the burden of proof because " . . . I think he would certainly stick with the reasonable doubt standard." JA 75. The prosecutor stated that there was cause for removal because:

> . . . he is very confused about the statements where he said that if a person can't kill again, in other words, he's locked up for the rest of his life, he said, basically, he could vote for the death penalty if it was proved beyond a shadow of. And I am certainly going to concede that he means beyond a reasonable doubt. And if a person kills and will kill again. And I think he has some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

Id. Defense counsel replied, "We have no objection." And, the trial court granted the prosecutor's cause challenge. *Id.*

3. THE WASHINGTON STATE SUPREME COURT

The Washington State Supreme Court said, " . . . the trial court did not abuse its discretion in excusing Mr. Deal for cause." *State v. Brown*, 132 Wn.2d 529, 602, 940 P.2d 546 (1997); Pet. App. 173a. That Court said:

> On voir dire he indicated he would impose the death penalty where the defendant "would violate if released," which is not a correct statement of the law. He also misunderstood the State's burden of proof in a criminal case and understood it to be "beyond a shadow of a doubt," although he was corrected later.

Id.

4. THE CIRCUIT COURT

In its opinion, which Brown discusses more fully below, the Ninth Circuit reviewed the state court record and determined that the state courts' determination that Juror Deal was substantially impaired was an unreasonable application of this Court's controlling precedent because the state courts focused on factors that were not relevant. Further, even if the state courts made findings that could justify excusing Juror Deal for cause, such a determination of the facts would be unreasonable in light of the evidence presented, and the presumption of correctness as to such factual findings would be overcome. Pet. App. 1a-41a.

B. SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the Circuit Court under 28 U.S.C. § 2254(d)(1) and (d)(2). The Washington State trial court and the State Supreme Court properly recognized that under this Court's controlling precedent, a prospective juror in a capital case may be excluded for cause based on his views regarding capital punishment only when those views would prevent or substantially impair the performance of the juror's duties

in accordance with the trial court's instructions and the juror's oath. *Gray v. Mississippi*, 481 U.S. 648, 658 (1987).

There were arguably two rulings by the state courts on this issue. The first ruling was the Washington State Supreme Court's determination that Juror Deal was properly excused because he "indicated he would impose the death penalty where the defendant 'would violate if released' which is not a correct statement of the law." The second ruling was the trial court's unadorned grant of the State's motion to excuse the Juror Deal.

The Washington State Supreme Court's decision was objectively unreasonable, however, because even if Juror Deal was confused about the fine points of Washington law, the record did not demonstrate that Juror Deal held any views about capital punishment that substantially impaired his ability to consider the facts and the law. Thus, the Washington State Supreme Court's ruling was an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1).

As the Washington State Supreme Court found, the trial court's exclusion of Juror Deal was based on his misunderstanding of the law, and not on any true finding that his views would prevent him from fairly considering the death penalty. Further, even if the trial court had actually found that Juror Deal's views regarding the death penalty substantially impaired his ability to impose it, such a finding would be an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(2). In voir dire Juror Deal stated *six times* that he could follow the law and impose the death penalty while not once stating he might not be able to so. Similarly, if any presumption of correctness applies to such

hypothetical factfinding, it is easily rebutted by the clear and convincing evidence in the record. 28 U.S.C. § 2254(e)(1).

C. ARGUMENT

1. THE PROPER STANDARD OF REVIEW

The Circuit Court's opinion is not entirely clear as to which precise section of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA) controls this case. Uttecht's brief cites to several sections of AEDPA. In Brown's view this case is governed by 28 U.S.C. § 2254(d)(1)'s prohibition against the unreasonable application of this Court's precedent and section (d)(2)'s prohibition against affirming a state court decision based upon an unreasonable determination of the facts. That statute provides:

> An application for a writ of habeas corpus on behalf of a person in state custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States: or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In subsection 1, the terms "contrary to" and "unreasonable application" have independent meanings. *Bell v. Cone*, 535 U.S. 685, 694 (2002). Under the "unreasonable

application" clause, a federal court may grant the writ if the state court identifies the correct governing legal principle but unreasonably applies it to the facts of the prisoner's case. *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

2. THE WASHINGTON STATE SUPREME COURT'S DECISION WAS AN OBJECTIVELY UNREASONABLE APPLICATION OF *WITT*, *WITHERSPOON* AND *GRAY*

The trial court may not constitutionally excuse jurors from sitting on a capital case merely because the jurors have reservations about the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Wainwright v. Witt*, 469 U.S. 412 (1985). A juror may not be excluded merely because of conscientious scruples about capital punishment if the juror is "willing to consider all of the penalties provided by state law," and is not "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Witherspoon v. Illinois*, 391 U.S. at 522 n.21. "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Id.* at 519.

The parties agree that the standard for determining whether a prospective juror may be excluded for cause based on their views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Gray v. Mississippi*, 481 U.S.

648, 658 (1987); *Wainwright v. Witt*, 469 U.S. at 424; *Adams v. Texas*, 448 U.S. 38, 45 (1980).

This standard is rooted in the constitutional right to an impartial jury, *Wainwright v. Witt*, 469 U.S. at 416, and because "the impartiality of the adjudicator goes to the very integrity of the legal system," the harmless-error analysis cannot apply. *Gray v. Mississippi*, 481 U.S. at 668.

In this case there were arguably two state court "findings" regarding Juror Deal. The first ruling was the Washington State Supreme Court's determination that Juror Deal was properly excused because he "indicated he would impose the death penalty where the defendant 'would violate if released' which is not a correct statement of the law." The second ruling, discussed in Section 3, was the trial court's unadorned grant of the State's motion to excuse Juror Deal. Uttecht refers to the state court "findings" in his brief without distinction. In Brown's view, however, both state courts' decisions were properly reversed, even under the constraints of AEDPA, although for different reasons.

The Washington State Supreme Court concluded that the trial court excluded Juror Deal because he was confused about Washington law. As Judge Kozinski points out, taking the Washington State Supreme Court's holding in a light most favorable to the State, the decision to affirm the trial court was objectively unreasonable under this Court's precedent. Pet. App. 17a. A prospective juror may be excluded for cause only if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions

and his oath." *Gray v. Mississippi*, 481 U.S. 648, 658 (1987).

Juror Deal never said he could only impose the death penalty if there were proof that the defendant would kill again. He simply stated that recidivism was one factor that would be important to his decision. There is nothing about this statement that indicates he could not follow the law or his oath. At best, the Washington State Supreme Court found that confusion was a proper basis for a challenge for cause in a capital case. As the panel noted, this is not the law as expressed by this Court.[2]

A prospective juror's confusion about the law during voir dire is simply not a basis for concluding that his views about the death penalty would substantially impair his ability to follow the law or honor his oath. Few jurors could pass a quiz about the law during voir dire, but that does not mean they are unwilling or unable to follow the law after being given instructions at the close of the case.

Uttecht's argument in his brief actually expands the Washington State Supreme Court's finding. Uttecht cites to Juror Deal's statements that he would impose the death penalty in a "severe situation" and his comments that he would be more likely to vote for the death penalty if the person would kill again. Uttecht says that "[i]n Washington, the prosecutor need not prove the defendant will go

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[2] Judge Kozinski also expressed the reason why this should never be the policy endorsed by this Court. He said: "If all prospective jurors who did not fully understand the law were struck, only lawyers would be allowed to serve on juries (and only a handful of lawyers at that)." Pet. App. 17a.

out and kill again." Brief of Petitioner at 37.[3] From that he argues that Juror Deal would not be able to consider the death penalty when the only possible penalties would be life in prison or the death penalty. But Juror Deal did not say that.

In fact, the question was put to him directly by the prosecutor who asked:

> But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

Juror Deal's unequivocal answer was:

> I could consider it, yes.

JA 73.

The Washington State Supreme Court's finding was also based upon a faulty factual premise, specifically, a faulty reading of Washington's capital punishment scheme. Washington's death penalty statute provides for a two-phase trial.[4] *See* RCW 10.95 *et seq.* In the first or

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[3] The Washington State Supreme Court also appeared to hold that Deal misunderstood the burden of proof at trial and that misunderstanding justified excusing him. The prosecutor withdrew that as a basis for his motion to exclude Juror Deal at trial. Moreover, Uttecht does not urge that as a proper basis for affirming the state courts. *See* Brief of Appellant at 37-40. But, as argued above, confusion about the law of the state of Washington says nothing about a juror's ability to follow his oath and the court's instructions.

[4] In the Ninth Circuit, the dissenting justices held that: "Although some might find that Juror Z had eschewed and rejected his prior improper basis for application of the death penalty, a reasonable mind could just as easily find that he *had not* eschewed and rejected that

(Continued on following page)

"guilt" phase, the jury must consider whether the defendant has committed premeditated murder with aggravating circumstances. RCW 10.95.020. If the defendant is convicted of that charge, the jury is reconvened to consider punishment during the "penalty" phase. RCW 10.95.060.

In seeking a death sentence during the penalty phase, the State may present evidence of (a) defendant's prior criminal convictions, (b) matters that would have been admissible during the guilt phase, and (c) matters describing the victim and the impact of the crime on the victim's family. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995); *see also* RCW 10.95.060(3). The State may also rebut matters raised in mitigation. *Id.*

Washington statutes clearly place the sentencing phase burden on the prosecution to prove beyond a reasonable doubt the absence of sufficient mitigating circumstances to merit leniency. RCW 10.95.060(4); JA 149 (Court's Penalty Phase Instruction #5). At the conclusion of the proceeding, the following question is submitted to the jury:

> Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?

RCW 10.95.060(4). This statutory question was given to the jury in this case. JA 150 (Court's Penalty Phase Instruction #6).

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basis." Pet. App. at 37a. But, the dissenters' premise is incorrect. Juror Deal never articulated an "improper" consideration under Washington law, and thus, it was not reasonable for the Washington courts to conclude that he had.

In deciding the question posed by RCW 10.95.060(4), the jury may consider any relevant factors, including but not limited to the following:

(1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;

(2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;

(3) Whether the victim consented to the act of murder;

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect. However, a person found to be mentally retarded under RCW 10.95.030(2) may in no case be sentenced to death;

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

RCW 10.95.070 (emphasis added).

The Washington State Supreme Court has held that it is entirely proper for a prosecutor to argue that a defendant will pose a danger in the future even if sentenced to life in prison without the possibility of parole. *State v. Gentry*, *supra* at 641. That court stated:

> The evidence introduced during the penalty phase of the trial showed that the Defendant had been convicted of rape with a deadly weapon and of manslaughter, as well as other crimes, before he was convicted of aggravated first-degree murder in this case. From the facts before the jury, it was not unreasonable for the prosecuting attorney to argue that the Defendant is a dangerous person who would continue to present a danger even while incarcerated.

Id.

Thus, contrary to statements made in the briefing by Uttecht, future dangerousness is relevant under Washington's death penalty scheme. RCW 10.95.070(8). The converse, of course, is that evidence that a defendant does not pose a risk of probable future dangerousness is also relevant. This Court has held that evidence of probable future conduct in prison as a well-behaved, well-adjusted prisoner is relevant mitigating evidence, which is appropriately considered by a jury in deciding on a sentence less than death. *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986). In deciding whether to impose a death sentence, the "sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant

mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998).[5]

In this case, the Washington State Supreme Court presumed that Juror Deal was excused because he indicated he would impose the death penalty where the defendant "would violate if released." The Washington State Supreme Court did not correctly set out the law. Washington law specifically provides that issues of future dangerousness are proper considerations in capital cases. Juror Deal's stated concerns about recidivism actually reflected the law of Washington.[6] Thus, the Washington State Supreme Court's decision to excuse Juror Deal was an unreasonable application of the facts to the law.

Uttecht also seems to suggest that the only instruction given to the jury is the one describing the question they are to answer in Instruction 6. Brief of Petitioner at 38. But the jurors are also given additional instructions telling them that a "mitigating circumstance is a fact about either the offense or about the defendant which i[n] fairness or in mercy may be considered as extenuating or

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[5] In addition to these statutory factors, in Washington the jury may consider any other mitigating factors. *State v. Bartholomew*, 101 Wn.2d 631, 646-47, 683 P.2d 1079, 1086-87 (1984), *appeal after remand*, 104 Wn.2d 844, 710 P.2d 196 (1985) ("It is our belief that when a jury is faced with the question whether or not the defendant should be put to death, the defendant should be allowed to submit any evidence of his 'character or record and any of the circumstances of the offense,' to convince the jury that his life should be spared.").

[6] While it is true that the Washington State Supreme Court is the final arbiter of Washington law, it is clear that the court's statement in this case was a momentary lapse, not a rejection of the statute. The *Gentry* case, quoted above, was issued after the decision in this case and clarifies that recidivism remains a relevant consideration under Washington law.

reducing the degree of moral culpability or which justifies a sentence of less than death, although it does not justify or excuse the offense." *See e.g.* JA 151 (Court's Penalty Phase Instruction #7). Thus, a juror would be free to consider a defendant's lack of future dangerousness in any capital case if he thought it "justified a sentence of less than death."

3. THE WASHINGTON STATE TRIAL COURT'S "IMPLICIT FINDING" WAS AN OBJECTIVELY UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN STATE COURT

a. Clearly erroneous findings are addressed by this Court under 28 U.S.C. § 2254(d)(2).

Clearly erroneous factual findings have been addressed by this Court under 28 U.S.C. § 2254(d)(2). *Wiggins v. Smith*, 539 U.S. 510 (2003).[7] In that case, this Court considered whether or not trial counsel was ineffective in failing to properly investigate mitigating evidence in a capital case. The state court held that the investigation was adequate based, in part, upon evidence that trial counsel had social services records detailing Wiggins' childhood sexual abuse. Thus, the state court concluded that the failure to present the evidence of sexual abuse was a tactical decision. This Court held that the state court's assumption that the social service records documented instances of this sexual abuse was incorrect and accordingly "reflects an unreasonable determination of the

[7] Brown assumes that AEDPA standards of review apply to both implicit and express findings by state trial courts.

facts in light of the evidence presented in the state court proceeding, § 2254(d)(2)." *Id.* at 528. *See also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding, § 2254(d)(2).").

Uttecht also cites to the "presumption of correctness" in 28 U.S.C. § 2254(e)(1). Brief of Petitioner at 22-26. The relationship between the standards in §§ 2254(e)(1) and 2254(d)(2) remains unclear.[8] But the resolution of this case does not depend upon whether this Court applies only § (d)(2)'s prohibition against affirming a state court decision based upon an unreasonable determination of the facts or whether this Court first applies a "presumption of correctness" to those facts. The clear and convincing evidence in the record that Juror Deal was fit to serve on a capital jury overcomes any presumption that the trial court's implicit factual findings were correct. Thus, this Court need not resolve the issue in this case. *See e.g. Rice v. Collins*, 546 U.S. 333 (2006) (Even though the parties disagreed about the application of § 2254(d)(2) and (e)(1), the Court did not need to address the disagreement in order to resolve the case).

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[8] Under one view, 28 U.S.C. § 2254(e)(1) applies only to challenges based on extrinsic evidence, or evidence presented for the first time in federal court, and requires proof by clear and convincing evidence, while the court must apply 28 U.S.C. § 2254(d)(2) to intrinsic review of a state court's processes, or situations where petitioner challenges the state court's findings based entirely on the state record. *See e.g. Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004), *cert. denied, Maddox v. Taylor*, 543 U.S. 1038 (2004).

b. To the extent that the trial court made a "finding" that Juror Deal was substantially impaired, it was objectively unreasonable and contrary to the clear and convincing evidence on the record.

Uttecht argues that the factual finding that Deal was substantially impaired is implicit from the following facts: "there is a transcript of voir dire showing the potential juror was questioned in the presence of counsel and the judge; at the end of colloquy, the prosecution challenged the juror; and the challenge was sustained when the judge dismissed the juror." Brief of Petitioner at 20. In Uttecht's view, if Juror Deal was excused, it must have been for a proper reason, even if no reason was articulated on the record and the actual transcript of the proceedings demonstrates otherwise.

Uttecht first cites to *Wainwright v. Witt,* 469 U.S. 412 (1985), and *Darden v. Wainwright,* 477 U.S. 168 (1986), for this proposition. Neither case supports his position, however. In those cases the challenged jurors stated express views that would likely prevent them from following the law. In *Darden*, the trial court asked the juror, "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" After the juror responded, "Yes, I have," he was excused. *Darden v. Wainwright*, 477 U.S. at 177.[9]

[9] The Court also noted that the juror had spent eight years working in the administration office of St. Pios Seminary. *Darden*, 477 U.S. at 178.

In *Witt* the questioning was as follows:

> [Q. Prosecutor]: Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
>
> [A. Colby]: I am afraid personally but not –
>
> [Q]: Speak up, please.
>
> [A]: I am afraid of being a little personal, but definitely not religious.
>
> [Q]: Now, would that interfere with you sitting as a juror in this case?
>
> [A]: I am afraid it would.
>
> [Q]: You are afraid it would?
>
> [A]: Yes, Sir.
>
> [Q]: Would it interfere with judging the guilt or innocence of the Defendant in this case?
>
> [A]: I think so.
>
> [Q]: You think it would.
>
> [A]: I think it would.
>
> [Q]: Your honor, I would move for cause at this point.
>
> THE COURT: All right. Step down.

Witt, 469 U.S. at 415-16. Later in the opinion, Chief Justice Rehnquist states that the challenged juror "on four separate occasions . . . affirmed that her beliefs would interfere with her sitting as a juror." *Id.* at 434.

In those cases, the record actually supported rather than contradicted the trial judges' rulings. The trial judges

took the jurors at their word and excused them. This Court affirmed those decisions. In this case, however, Juror Deal never once expressed any hesitation about his ability to follow the trial court's instructions on the law. As the Ninth Circuit panel decision noted, Juror Deal repeatedly and unequivocally stated the he could follow the law. Pet. App. at 10a n.5 ("In fact during the course of his voir dire, juror Z stated *six times* that he could follow the law and impose the death penalty, while not *once* stating that he might not be able to . . . ") (emphasis in original).

Uttecht also cites to several other decisions by this Court that he believes support his position. But all are distinguishable. In *Marshall v. Lonberger*, 459 U.S. 422 (1983), this Court gave deference to the state court's determination that the defendant's testimony regarding his prior out-of-state conviction was obtained through an involuntary plea was not credible. But in that case, unlike in this one, the other evidence introduced including the indictment, the record of the out-of-state conviction and the transcript of the plea hearing contradicted the defendant's testimony.

Patton v. Yount, 467 U.S. 1025 (1984), concerns the effect of pretrial publicity on the jury venire. In that case the petitioner identified three jurors he asserted were ambiguous and contradictory in their answers regarding their ability to be impartial given the pretrial publicity. This Court held that the trial court's determination that the jurors could serve was supported by their testimony but also by "the record of publicity," which did not "reveal the kind of 'wave of public passion' that would have made a fair trial unlikely." *Id.* at 1039. The challenged jury voir dire took place before Yount's second trial; four years after the commission of the crime and the first trial. Again, in

that case there was additional evidence that corroborated the trial judge's findings and made deference appropriate.[10]

The voir dire in this case unambiguously reveals that Juror Deal was willing to consider all of the evidence and both sentencing options in the penalty phase. It is remarkably similar to the facts described by this Court in *Gray v. Mississippi*, 481 U.S. at 651-55. In *Gray*, the challenged juror was excused because, according to the state and the trial judge, she was "indecisive." *Id.* at 655 n.7. Nonetheless, the state appellate courts reversed the trial court because the juror had been improperly excused for cause under the *Witt* standard. Here, the best that can be said of Juror Deal was that during voir dire he was "indecisive" about the circumstances in which he would vote to impose the death penalty, but he would consider all of the options in any given case. He is precisely the type of juror who can and should be seated in a capital case under the precedent issued by this Court.

Given the paucity of support for his "implicit" finding of impairment in the actual transcript, Uttecht argues that the trial judge's unique ability to observe the juror's body language and demeanor supports the trial judge's decision. While that might be a basis to uphold the trial court in some cases where the trial judge or the parties make a record of such observations, it is not a basis in this case. Neither the trial judge nor the prosecutor mentioned any postures, gestures or other unspoken behavior on the part of Juror Deal that would support the trial judge's

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[10] *Gomez v. United States*, 490 U.S. 858 (1989), is simply irrelevant. In that case, the issue was whether United States Magistrates could preside over jury selection in a felony trial.

ruling. Thus, not only does Uttecht urge this Court to uphold an implicit factual finding that is contrary to the record, he urges this Court to support that finding with speculation about what the trial court *might* have observed. This Court has made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it. *See Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam) (denying relief where state court's application of federal law was "supported by the record"); *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003) (reasonableness of state court's factual finding assessed "in light of the record before the court"). The record here supports only one conclusion: Juror Deal could properly serve on a capital jury.

Judge Kozinski identifies the problems with Uttecht's position under the statutory language when he points out that juror demeanor can only shed light on ambiguous evidence in the transcript, but it cannot contradict the witness's statements. Pet. App. 17a. In the trial court, the State, as the moving party, bears the burden of demonstrating that the *Witt* standard is satisfied as to each challenged juror. *Witt*, 469 U.S. at 424. But there was no mention of "demeanor" by the prosecutor in the trial court record. In this situation, nothing in AEDPA requires a federal court on habeas review to speculate that there was some definitive "demeanor" on the part of the juror that contradicted his express statements in order to uphold an otherwise objectively unreasonable decision.

It would be an odd rule indeed for this Court to hold that a trial judge can ignore or discount the juror's answers to the questions on voir dire in the absence of any other evidence to justify such an action. Brown agrees that if there was evidence cited to by the trial judge or the

challenging party – even just a gesture or a facial expression – that might be a basis to find that the juror's express statement that he could follow the law was not "conclusive." Similarly, in a case where the juror's responses were truly ambiguous, deference to the trial judge's assessment of demeanor may be appropriate. But here, Uttecht seems to urge this Court to hold that the juror's statements are never conclusive even where the trial record is unambiguous and in the absence of any contradictory evidence.

Judge Kozinski and the panel were also acutely aware of this Court's decision in *Rice v. Collins,* 546 U.S. 333 (2006); Pet. App. at 19a n.10. In that case, this Court held that the Ninth Circuit overstepped its bounds on AEDPA review. But that case is distinguishable from this one. In *Rice*, the Ninth Circuit held that it was unreasonable for the trial court to accept the prosecutor's race-neutral explanation – youth and demeanor – for a peremptory challenge of a juror. But, as Judge Kozinski points out, in that case there was actually an express ruling from the trial court that the juror's youth was an acceptable race-neutral reason for excluding the juror. As to demeanor, the prosecutor cited to a concerning gesture on the record – eye rolling. Moreover, the trial court had applied the correct legal standards.

The Brief of the State of Oregon, *et al.*, argues that this Court should not issue an opinion that "requires judges to make express written findings on the record in order to qualify for the 'presumption of correctness.'" *See* Brief of Oregon, *et al.*, at 13. Brown is not urging such a ruling. Rather, he is arguing that like express findings, implicit findings must have some support in the evidence and record before the reviewing court – even on habeas review.

Moreover, Brown respectfully disagrees that requiring trial courts to say something by way of a finding on the record would unduly delay trials. Even a sentence or two would be sufficient for most reviewing courts. If the trial court simply cites the correct standard and some legitimate reason for its actions, the decision to give conclusive deference would be obvious. It would certainly be advantageous to the inevitable appellate review of habeas cases to encourage, rather than discourage, trial courts to articulate some factual findings on the record to support their decisions in capital cases. For example, in *Norton v. Spencer*, 351 F.3d 1, 6 (1st Cir. 2003), the Circuit court complained: "It is difficult to determine how to approach the analysis under AEDPA because neither the trial court nor the [appellate court] provided a thorough explanation of their decisions." *See also Hennon v. Cooper*, 109 F.3d 330, 335 (1997) ("[O]f course the better the job the state court does in explaining the grounds for its rulings, the more likely those rulings are to withstand further judicial review.").

Uttecht's view of the AEDPA standard of review of state court factual findings is extreme. It is true that AEDPA embodied Congress's intent to limit and structure federal habeas review of state court convictions. But it did not *eliminate* federal review of factual findings. As Judge Kozinski points out in the panel decision, adopting Uttecht's view of the federal habeas standards would essentially end federal habeas review not just of jury selection in capital cases, but of all factual issues on habeas review. He says:

> If appellate courts must defer to trial court findings on a transcript such as this . . . not only is *Witherspoon* a dead letter, but all substantial

> evidence review of trial court factual findings is obsolete.

Pet. App. 17a.

The AEDPA deference standards are demanding but not "insatiable." As this Court has stated, "[d]eference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). This Court went on to say:

> Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Id., *affirmed*, *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

Concerns about rendering federal court review obsolete are particularly acute with regard to juror challenges in capital cases. This Court has stressed the "acute need" for reliable decision making when the death penalty is at issue. *See Deck v. Missouri*, 544 U.S. 622, 632 (2005); *see also Herrera v. Collins*, 506 U.S. 390, 404 (1993) (The Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed.) Reliable decision-making, even on habeas review, requires that the federal court find some evidence, either direct or circumstantial, to support a trial court finding that would overcome uncontroverted evidence to the contrary.

4. THE FACT THAT BROWN'S LAWYERS DID NOT OBJECT DOES NOT AID UTTECHT'S ARGUMENTS UNDER UNIQUE ASPECTS OF WASHINGTON LAW

Uttecht also argues that defense counsel's failure to object was "significant" in this case because, had counsel done so, "the trial judge would have put his reasons for finding Mr. Deal substantially impaired on the record." Brief of Petitioner at 38. But Washington law does not support this argument. The Washington State Supreme Court has "long held that even if the defendant fails to object at trial, error may be raised on appeal if it 'invades a fundamental right of the accused.'" *State v. Levy*, 156 Wn.2d 709, 132 P.3d 1076 (2006), quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).[11]

Specifically, the Washington Court of Appeals held in 1992, one year before jury selection in this case, that *Batson*[12] challenges, specifically those based on gender discrimination, could be raised for the first time on appeal. *State v. Burch*, 65 Wn. App. 828, 830 P.2d 357 (1992); *see also State v. Beliz*, 104 Wn. App. 206, 15 P.3d 683 (2001).[13]

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[11] Washington's Rules of Appellate Procedure codify this right: "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a).

[12] *Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting the use of preemptory challenges designed to discriminate on the basis of race).

[13] In a subsequent case, a Washington appellate court went even further, imposing a duty on the trial judge to insure an impartial jury despite the lack of defense objection.

(Continued on following page)

In short, Brown's lawyer did not have to object in order to preserve this error for review in Washington. Both the prosecutor and the trial judge knew that defense counsel's failure to object to the improper recusal of a juror would not prevent appellate review. And, in fact, it did not. As discussed above, the Washington State Supreme Court decided this issue on its merits. *See State v. Brown*, 132 Wn.2d 529, 586, 940 P.2d 546 (1997); JA 173a.[14] Under those circumstances, neither the trial judge nor the prosecutor could or should have taken any comfort in the assumption that because defense counsel did not object, he agreed with the trial court's assessment that the juror was

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> Accordingly, when a trial judge presides over a trial where the peremptory challenge is being used in an invidiously discriminatory way, that judge may, in his or her discretion, act to protect the rights secured by the equal protection clause by raising a *Batson* issue. Failure to act in such a situation runs the substantial risk of casting doubt on the fairness of the judicial process. Taking appropriate action in such a situation promotes respect for the law. And taking such action is consistent with a court's considerable discretion in conducting judicial proceedings in a way that is fair to all. In short, a judge need not sit idly by while the right to participate in our judicial system, free of bias, is infringed by the discriminatory use of peremptory challenges.

State v. Evans, 100 Wn. App. 757, 767, 998 P.2d 373 (2000).

[14] Consideration of constitutional errors raised for the first time on appeal is not uncommon in Washington. *See e.g. State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006) (accused's rights to a public trial and to be present at his criminal trial); *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046, *cert. denied*, 534 U.S. 964 (2001) (right to appear pro se); *State v. Greiff*, 141 Wn.2d 910, 10 P.3d 390 (2000) (ineffective assistance of counsel); *State v. Knotek*, 136 Wn. App. 412, 149 P.3d 676 (2006) (involuntariness of a guilty plea); *State v. Littlefair*, 129 Wn. App. 330, 119 P.3d 359 (2005) (failure to suppress evidence); *State v. Curtis*, 110 Wn. App. 6, 37 P.3d 1274 (2002) (right to remain silent); *State v. Clowes*, 104 Wn. App. 935, 18 P.3d 596 (2001) (failing to instruct the jury on an element of the crime charged).

substantially impaired. Thus, the lack of citation to a proper reason is far more telling than Brown's failure to object. If there had been a proper reason for excusing Juror Deal, either the prosecutor or the judge should have made sure the record reflected that excusing Juror Deal comported with the constitutional standards.

5. THE NEED FOR DEFERENCE IN THIS CASE IS NO STRONGER THAN IN ANY OTHER CASE

Finally, the Solicitor General argues that the "case for deference is particularly strong (and the costs of reversal particularly high) in a case like this where the trial court has *granted* a motion to strike for cause, because there is no risk that a biased juror will actually sit." Brief for the United States at 18-19. But the issue addressed by the *Witt* and *Witherspoon* cases was not that biased jurors were being seated on capital juries. The problem was identical to that here: preventing jury selection that results in a "tribunal organized to return a verdict of death." *Witherspoon*, 391 U.S. at 521.

> Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

Id. at 521-22. Thus, the case for deference is not "particularly strong" here nor are the "costs of reversal particularly high." The case for deference is no stronger here than in *Witt*, *Witherspoon*, *Darden*, *Adams* and *Gray*. The Ninth

Circuit gave the proper deference to the findings, such as they were, in this case and properly concluded that the decisions in the state courts were objectively unreasonable.

D. CONCLUSION

This Court should affirm the Circuit court's grant of Brown's writ of habeas corpus.

Respectfully submitted,

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